MAR 26 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1948

No. 672

MARKOS VLAVIANOS, ET AL.,
Petitioners,

vs.

S. S. CYPRESS
and
MARYLAND DRYDOCK COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

I. DUKE AVNET,
Attorney for Petitioners.

The Daily Record Co., Baltimore 3, Md.

SUBJECT INDEX

Petition

	PAGE
Statement of the Matter Involved	1
This Court Has Jurisdiction	4
The Questions Presented	5
Reasons Relied Upon For Allowance of Writ	6

Brief

The Opinions Below	9
Jurisdiction	9
Statement of the Case	10
Errors Relied Upon	11
Argument:	
Point I. The Petitioners Are Entitled to a Maritime Lien For Wages Due Them Under Their Written Contract Entered Into With The Owner On June 7, 1947	11
Point II. Petitioners Are Entitled To The Full Benefits Of The Federal Statute (46 U.S.C.A. Sec. 594) Which Fixes The Measure of Compensation And Damages For Breach of Written Contract	14
Point III. Petitioners Are Entitled To A Maritime Lien For Services Rendered By Them From And After The Date The Vessel Was Libelled	17

PAGE

Point IV. The Circuit Court Made Miscellaneous Errors In Its Rulings and Findings:

(a) It should not have ruled out oral testimony of the petitioners bearing on the written contract 19

(b) Petitioner Vlavianos is entitled to a maritime lien for his services rendered under the written contract in his capacity as radio operator 20

(c) Petitioner Georgiou is entitled to a maritime lien for monies which he advanced to a passenger to reimburse the passenger for his prepaid fare and to secure the release of the master from the custody of the law 22

CONCLUSION 23

TABLE OF CASES CITED

Brown v. U. S., 283 F. 425 16
Case v. Phoenix Bridge Co., 11 N. Y. S. 724, 31 N. E. 254 19
Florentine v. Grace Line, 50 F. S. 67 15
Garcia v. Standard Fruit Co., 1947 A.M.C. 341 16
Kerr v. Stern, 175 N. Y. S. 475 19
Meade v. Rutledge, 11 Texas 44 19
Mills v. Roto Co., 133 A. 913, 104 Conn. 645 19
Newman v. U. S. A., 1943 A.M.C. 840, 14 F. (2d) 191 ..... 15, 16
New York Drydock Co. v. Poznan, 274 U. S. 167 18
Owen v. U. S., et al., 1945 A.M.C. 595 20
Ryn v. Alaska S. S. Co., 65 P. (2d) 695 16
Slavin v. Port Service Co., 138 F. (2d) 386 21
Swift v. Knowles, 1939 A.M.C. 130 20
The Eire, 60 F. (2d) 124 14

PAGE

The Great Canton, 299 F. 953 16
The Herbert L. Rawdings, 55 F. S. 156 18
The Herdis, 22 F. (2d) 304 ..... 20, 21
The Leonidas, 116 F. (2d) 440 ..... 14, 15
The Louise, 54 F. S. 157 16
The Sonderberg, 47 F. (2d) 723 ..... 14, 15
The Steel Trader, 275 U. S. 388 15
The William Leishear, 21 F. (2d) 862 ..... 11, 18, 23
Usatorre v. Compania Argentina, etc., 64 F. S. 370 15
Vlavianos, et al. v. S. S. Cypress, et al., 171 F. (2d) 435 9
Wandtke v. Anderson, 74 F. (2d) 381 20

Table of Rules

U. S. Code Title 28, Judiciary and Judicial Procedure, Chapter 81, Section 1254 ..... 4, 9
Supreme Court Rules—Rule 38, par. 5b 5, 10

Table of Statutes

Title 46 U.S.C.A. 594 ..... 3, 4, 5, 6, 11, 14, 15, 20, 23
Title 46 U.S.C.A. 953 11
Title 46 U.S.C.A. 971 22

Other Authorities

1 Benedict on Admiralty, pp. 19, 20 11
1 Benedict on Admiralty, p. 291 14
12 Corpus Juris, p. 1302 17
32 Corpus Juris Secundum, p. 929 19
32 Corpus Juris Secundum, p. 1035 19

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1948

No. ------

MARKOS VLAVIANOS, ET AL.,
Petitioners,

vs.

S. S. CYPRESS
and
MARYLAND DRYDOCK COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioners, Markos Vlavianos, Gregorios Mpeis, Demetrios Trikoglou, Ioannis Georgiou, Dimitrios Merkouris, Georgios Kalogridis, Georgios Vamvakaris, Andreas Moschos, Evangelos Poutous, Michalis Rankgavis, Evangelos Xagoraris, Polidorus Patrikis, Kostantinos Linardopoulos and Panagiotis Alexandratos, respectfully petition this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

STATEMENT OF THE MATTER INVOLVED

This case involves a suit for wages and monies due and is brought by fourteen seamen against the S.S. CYPRESS, a vessel of Panamanian registry. Thirteen of the seamen are Greek citizens and one is an American.

The seamen joined the said vessel in Baltimore, Maryland, from about April 27, 1947 up to and about May 25, 1947, and by virtue of an oral agreement were to be paid on the basis of a daily wage varying according to the capacity in which each seaman was employed on the vessel (R. 1-3; 11-14; 26, 31, 49).

On June 7, 1947, a written contract was entered into by the seamen with the owner, with the exception of the master (R. 16, 20). The written contracts were to be effective from June 7, 1947 and were to continue in force and effect for the duration of a voyage from the port of Baltimore to Greece (Libellants' Exhibit No. 1; R. 84, 85). The wage of each of the seamen was substantially higher for the period of the written than for the oral contract. It was contemplated that the voyage would not take over a period of one month (Libellants' Exhibit No. 1; R. 84, 85). The Captain entered into an oral agreement with the owner to the same effect (R. 14, 15). However, he was employed to serve not only as master but also as radio operator for the vessel (R. 14, 17, 75). The petitioners were given certain money advances to be credited against the total wages due them under these written contracts (R. 21).

The petitioners performed all of their duties on the vessel but on or about June 28, 1947, they were notified by the owner that he did not intend to make the voyage and inquired if the seamen would accept their pay on the basis of the daily rate in the oral agreement rather than that in the written contract. The men refused and insisted that they get paid at the rate specified in the written contract for the period covered by the written contract (R. 25).

On the failure of the owner to pay the wages, the petitioners filed a libel in admiralty against the vessel and she

was attached in the port of Baltimore on July 2, 1947. Subsequent to the filing of this libel numerous intervening libels were filed representing divers claims for repair work, supplies and wharfage furnished the vessel in anticipation of the voyage. The largest claim of such intervening lienors was that of the Maryland Drydock Company for repair work done. The vessel was finally sold on a directed sale by the Federal district court in Maryland and brought $18,000.

There were various claims by petitioners for overtime work and extra work which were not disputed by the owner. A claim of lien against certain coils of rope taken on as a cargo is dropped for purposes of this petition.

The petitioners claimed wages due them as aforesaid and also compensation to the extent of one month's wages on account of the breach of their contract of employment by the owner of said steamship, in pursuance of a statute of the United States, namely Section 594 of Title 46 of the United States Code Annotated. The amount of this claim came to eighteen thousand, five hundred seventy-two dollars and fifty-nine cents ($18,572.59). Petitioners filed also an intervening libel for services rendered at the request of the captain of the said vessel representing the owner thereof, and in pursuance of an oral agreement made with the captain covering the period from June 28, 1947, the date that the written agreement was breached by the shipowner, to August 5, 1947, the date they ceased to perform work on the vessel (R. 10-13; 25-28). These wages total four thousand, eight hundred thirty-two dollars ($4,832.00). In addition thereto claim is made by the libellant Mpeis in the sum of one hundred ninety-seven dollars and fifty-four cents ($179.54) for monies expended by him for food and other items for the benefit of the ship (R. 12, 35). The

petitioner Georgiou makes claim for the sum of three hundred five dollars ($305.00) to reimburse him for refunding monies to a passenger who had paid his fare previously but who did not get his fare back and thereupon had the captain arrested. Petitioner Georgiou paid the money in the police court in the sum of three hundred dollars ($300.00) to the passenger at the request of the captain in order to release the captain, and also incurred the expense of five dollars ($5.00) for taxicab fare to and from the police station (R. 12, 13, 72). The total in the said intervening libel is five thousand, three hundred thirty-four dollars and fifty-four cents ($5,334.54) (R. 13). The grand total claim of petitioners as set forth in the original claim and intervening libel is twenty-three thousand, nine hundred seven dollars and thirteen cents ($23,907.13).

The District Court awarded the petitioners a total of only $1,750.65, allowing wages up to the date the vessel was libelled at the daily rate and disallowed all other claims including that of the Captain-Radio Operator, M. Vlavianos. On Appeal to the Fourth Circuit Court of Appeals, the Court made the same findings and award but added one month's pay for each of the successful libellants in pursuance to the aforesaid wage statute (46 U.S.C.A. Sec. 594) but computed same at the daily rate instead of the written contract rate. This meant an award to the successful libellants in the sum total of approximately $5,350.65.

THIS COURT HAS JURISDICTION

The jurisdiction of this Court is invoked under Chapter 81, Section 1254 of the new Judicial Code (U. S. Code Title 28, Judiciary and Judicial Procedure). The United States Court of Appeals for the Fourth Circuit in this case "has decided a federal question or questions in a way probably

in conflict with applicable decisions of this Court" (S. Ct.—Rule 38, par. 5b).

The chief statutory provision concerned with here is Title 46 U.S.C.A. Sec. 594 which fixes the measure of compensation and damages for seamen where their written contract of employment is wrongfully terminated. It is contended by petitioners that this statute was improperly applied in this case and in a way flagrantly in conflict with decisions of this court to the serious detriment and loss of the petitioners.

The decision was made by the United States Circuit Court of Appeals for the Fourth Circuit on December 27, 1948.

THE QUESTIONS PRESENTED

1. Are the petitioners entitled to a maritime lien for wages due them under their *written* contract?

2. Are the petitioners entitled to the *full* benefits of the federal statute (46 U. S. C. A. Sec. 594) which fixes the measure of compensation and damages for breach of a written contract?

3. Are the petitioners entitled to a maritime lien for services rendered from and after the date the vessel was libelled?

4. Did the lower courts err in (a) excluding oral testimony in reference to the written contract, (b) disqualifying the captain-radio operator from a lien for wages, (c) denying the claim of libellant Georgiou for money advances made for the benefit of the Captain and the vessel?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The written contract made between the seamen and the owner expressly stated that the contract was to be "in effect from the day of its signing at Baltimore, June 7, 1947". There is nothing in the said contract which required the making of a voyage the precondition to payment under this contract. The testimony in the case corroborated this and was uncontradicted. The petitioners performed their end of this contract by giving their services but the owner breached the contract about June 28, 1947 by cancelling the voyage. The petitioners are entitled to their wages at the rate fixed in this written contract. It is well settled that a crew's wages constitute a preferred maritime lien.

2. The federal statute which is applicable (46 U. S. C. A. Sec. 594) allows any seaman "who has signed an agreement" and who is afterward discharged wrongfully before the commencement of the voyage or before one month's wages are earned, in addition to any wages earned, a sum equal in amount to one month's wages as compensation. This clear and imperative language was ignored by the appellate court below to the extent that it failed to compute such wages earned and the one month additional compensation at the rate fixed in the written contract for the period covered by it, but instead figured same at a much lower rate which was in effect under an oral agreement that preceded the written contract.

3. The owner acting through the Captain hired the petitioners to remain on the ship and to maintain it after the vessel was libelled. This was known by the U. S. Marshal and acquiesced in by him. This entitled petitioners to wages after the vessel was libelled.

4. The settled cases permit oral testimony to show the time when a written contract is to begin and the length of time it is to remain in force, particularly when it is claimed that the contract is not too clear on these points. Since the adverse lienors attacked the clarity of the written agreement on these matters, parol testimony should have been allowed.

A radio operator is considered a member of the crew and as such is entitled to a maritime lien for wages due him. M. Vlavianos should have been allowed a wage lien since he was radio operator as well as captain on the vessel.

A lien will attach in favor of a creditor who furnishes an item of necessaries to the vessel. The advance of monies by the petitioner Georgiou was such an item since it made possible the freedom of the Captain to sail the vessel.

Respectfully submitted,

I. DUKE AVNET,
602 Knickerbocker Bldg.,
Baltimore 2, Maryland,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1948

No. ------

MARKOS VLAVIANOS, ET AL.,
Petitioners,

VS.

S. S. CYPRESS
and
MARYLAND DRYDOCK COMPANY, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINIONS BELOW

The opinion of the United States Court for the District of Maryland, appears at pages 83-96 of the record, and the opinion of the United States Court of Appeals for the Fourth Circuit appears at pages 126-133 of the record and is reported in 171 F. 2nd 435.

JURISDICTION

The jurisdiction of this Court is invoked under Chapter 81, Section 1254 of the new Judicial Code (U. S. Code Title 28, Judiciary and Judicial Procedure). The United States

Court of Appeals for the Fourth Circuit in this case "has decided a federal question or questions in a way probably in conflict with applicable decisions of this Court" (S. Ct. —Rule 38, par. 5b).

STATEMENT OF THE CASE

This is a claim for wages brought by 14 seamen, thirteen of whom are foreign seamen, against the S. S. CYPRESS, a vessel of Panamanian registry. The vessel was libelled by them on July 2, 1947 in the port of Baltimore, Maryland. The vessel was sold on order of the United States District Court in Maryland and the proceeds of about $18,000 deposited in that Court. The petitioners had joined the vessel in Baltimore and at first served under an oral agreement on a day-to-day basis. On June 7, 1947, petitioners, with the exception of M. Vlavianos, signed a written contract with the owner to be effective from that date and was to continue in force and effect for the duration of a voyage to Greece. It was contemplated that the voyage would not take over a period of one month. The petitioner, Vlavianos, was to act as captain and radio operator; he entered into an oral agreement with the owner to the same effect as that entered into by the other petitioners in writing. Libellants performed their end of the contract but about June 28, 1947 the owner notified them that the voyage would not be made and refused to pay them at the written contract rate. The petitioners were hired by the owner acting through the captain to remain on and to maintain the vessel after it was libelled by the crew. This the crew did until August 5, 1947. The lower courts did not grant the full claims made by the petitioners and so this appeal is taken.

ERRORS RELIED UPON

The United States Circuit Court of Appeals for the Fourth Circuit erred in:

1. Denying the petitioners a maritime lien for wages due them under their written contract.

2. Denying the petitioners the full benefits of the federal statute (46 U. S. C. A., Sec. 594) which fixes the measure of compensation and damages for breach of a written contract.

3. Denying the petitioners a maritime lien for services rendered from and after the date the vessel was libelled.

4. Miscellaneous rulings and findings which (a) excluded oral testimony bearing on the written contract, (b) disqualified from a lien the petitioner Vlavianos who was hired as captain and radio operator, (c) denied the claim of petitioner Georgiou for monies advanced for the benefit of the captain and the vessel.

ARGUMENT

POINT I.

THE PETITIONERS ARE ENTITLED TO A MARITIME LIEN FOR WAGES DUE THEM UNDER THEIR WRITTEN CONTRACT ENTERED INTO WITH THE OWNER ON JUNE 7, 1947.

Crew's wages constitute a preferred maritime lien. 46 *U. S. C. A.* 953; *The William Leishear* 21 F. 2nd 862; *Benedict on Admiralty*, Vol. I, Sec. 11, pps. 19, 20.

A written contract was entered into between thirteen of the petitioners and the owners, to be effective immediately on June 7, 1947 (Libellant's Exhibit No. 1, R. 14, 15). The remaining petitioner entered into an oral contract with the owner to serve in the dual capacity of master and radio

operator, effective as of the same date (R. 77, 78). There is no dispute or contradiction of these facts in the evidence. In fact, the only testimony in the case is that of the petitioners, all of which was taken by depositions through an interpreter. The only exception is some testimony, also taken by deposition, offered by Maryland Drydock Company, as intervening libellant bearing on services rendered after the vessel was libelled but having no relation to the said written or oral contracts. Upon execution of the written contract all the parties realized that the crew would be required to perform unusual services inasmuch as a full complement of seamen was not to be employed for this voyage; this being a small ship there was great chance that the passage would be more than ordinarily rough; and added duties would not only be required while the ship was on sea *but in port* (R. 49, 54). With all these things in mind and with full knowledge of them in the awareness of both the contracting parties, the wages set forth in the written contract represented a substantial increase over their prior wages at day rate.

The Circuit Court held that the written contract was not to be effective unless the voyage was actually made. There was no testimony whatsoever to support this. The testimony was to the contrary. Every petitioner questioned on this particular point testified that the contract was begun on and continued from June 7, 1947 (R. 65, 66, 69 74, 77-79, 81). In fact, it was perfectly clear and it was uncontradicted that whether the voyage was made or not the seamen were to receive their pay under the written contract. At pages 50 of the record appears the following testimony of petitioner Xagoraris testifying through the interpreter:

> "Q. Did he (naming Xagoraris) understand that the wages were to start on the date he signed the contract whether or not the ship left the port?

"(Mr. Dankmeyer) Objected to for the same reason as the two previous questions.

"(The Witness) Yes, sir, whether it sailed or not we were supposed to get the money."

Again at page 79 of the Record appears this testimony of the petitioner Patrikis:

"Q. Did you understand that that agreement was to begin on June 7th or later? A. Yes, the 7th of June.

"Q. Did he understand that the agreement was to begin on June 7th whether or not the ship left for Greece?

"(Mr. Dankmeyer) Objected to because the contract speaks for itself.

"(The Witness) This agreement was to be paid whether we left or not. It was an agreement for a month."

Further corroborating testimony on this point appears in the appendix as follows: Trikoglou (R. 66), Georgiou (R. 70), Mpeis (R. 75), Alexandratos (R. 76), Linardopoulos (R. 78), Moschos (R. 81), Merkouris (R. 83).

The testimony stands uncontradicted that the owner of the vessel, speaking through its president, Spyros G. Andreadis agreed that the seamen were to be entitled to their pay under the written contract whether the vessel left for Greece or not. On cross examination of witness Patrikis by counsel for Andreadis appears the following testimony at pages 80-81 of the Record:

"By Mr. Dankmeyer:

"Q. You said that you talked to Mr. Andreadis about the contract. What did he say to you about it? A. We agreed on three and a half million for one month.

"Q. Drachmas. Did he tell you you would get the three and a half million drachmas whether the ship sailed or not? A. Yes."

The contracts when read in their entirety gave no legal justification for the conclusion made by the Circuit Court. It is significant that the contracts were to be effective on the date of signing. The evidence was that the voyage could not be undertaken immediately but that some time would have to be consumed in making ready for the voyage (R. 100-101) If the voyage was to be the absolute precondition to the operation of the written contract, then certainly there would not have been included the provision for the contract to be effective immediately. As further evidence that the voyage was not a prerequisite to payment of wages on the terms specified in the contract, there is the uncontradicted testimony that the owner of the vessel advanced money against the written contract to the extent of $3,500.00 (18,20-21). There were receipts admitted into evidence for these advances which corroborate this testimony (R. 21).

Point II.

PETITIONERS ARE ENTITLED TO THE FULL BENEFITS OF THE FEDERAL STATUTE (46 USCA Sec. 594) WHICH FIXES THE MEASURE OF COMPENSATION AND DAMAGES FOR BREACH OF WRITTEN CONTRACT.

Generally speaking the law is that once a foreign vessel enters a harbor of the United States it subjects itself to the law of the United States and the persons in such a vessel must obey the laws and regulations of the port.

1 Benedict on Admiralty, p. 291;
The Leonidas, 4 C.C.A. 116 F. (2d) 440;
The Eire, 4 C.C.A. 60 F. (2d) 124.

The Courts have generally given to foreign seamen the benefit of the wage statutes affecting seamen. *The Sonderberg* (double wages for delay in payment to foreign sea-

men) 4 C.C.A. 47 F. (2d) 73, certiorari denied 284 U. S. 618; *The Leonidas,* supra; *Usatorre v. Compania Argentina etc.* (D. C. N. Y.) 1945, 64 F. Supp. 370 (suit for recovery of wages by foreign seamen and double penalties for delay).

In both the cases of *The Leonidas,* supra, and the *Usatorre* case, supra, the courts applied the American law even though the law of the flag which respective ships flew were contrary to the American law.

The particular statute which is applicable in the instant case reads as follows:

> "Any seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the Court hearing the case of having been improperly discharged recover such compensation as if it were wages duly earned." 46 U.S.C.A. 594.

In interpreting this statute the Courts have treated it as a remedial law, to be construed liberally and one which fixes the rule of damages when the shipowner fails to go through with the agreement.

> "The legislation was intended to afford seamen a simple summary method of establishing and enforcing damages." *The Steel Trader,* 275 U. S. 388 at p. 390.

Even though the shipowner is unable to go through with the agreement for reasons sometimes beyond his control, he nevertheless is obligated to pay the seamen the months pay under this statute. See *Florentine v. Grace Line,* 50 F. Supp. 67, *Newman et al. v. U.S.A.,* 2 C.C.A., 14 F (2d)

191, *Garcia v. Standard Fruit and Steamship Co.*, 1947 AMC 341. (Municipal Ct. N. Y.)

It is not necessary to prove fault on the part of the shipowner in order to recover under this section. See *Newman v. U. S.*, supra, *The Steel Trader*, supra, *Ryn v. Alaska Steamship Company*, 65 Pac. (2) 695.

Where a voyage is abandoned before the ship leaves the port this section operates to entitle the seamen to an additional month's wages. *Brown v. U. S.*, 283 F. 425, D. C. of Cal.

Furthermore, it has been held that the crew is considered discharged within the meaning of section 594 of 46 U.S.C.A. when the boat is libelled. See *The Great Canton* (D.C.N.Y.) 1924, 299 Fed. 953.

In Maryland it has been held by the United States District Court that where the crew had not earned a month's wages at the time of their discharge precipitated by the breaking up of the ship's voyage due to her unseaworthiness, that in such case the seamen would be entitled to a month's wages as compensation. *The Louise*, Dist. Ct. of Md. 1943, 54 F. Supp. 157.

How, then, did the appellate court below apply the statute in the face of these impressive and unambiguous authorities? The Circuit Court spoke as follows (R. 137):

> "* * * No doubt the monthly rate specified in the written contract ordinarily determines the amount of compensation to be paid a seaman under the statute when he is discharged without just cause; but since in this case that rate was fixed with reference to the perils of a voyage which was unexpectedly abandoned, the ends of justice will be served if the damages of the crew are computed at the rate customarily paid. That was the rate paid for the services actually performed

by the crew in this case, and the allowance of wages at the same rate for an additional month will effectuate the purposes of the Act."

Obviously, the Circuit Court sought to employ the operating principle of the statute but deliberately frustrated its full application. In effect, the appellate court legislated by amending the statute in this case to read that the wage rate shall be estimated at the port rate rather than at the contract rate. This the appellate court has no authority to do, since the law is well settled that where the intention of a statute can be indubitably ascertained the courts are bound to obey it, "whatever may be their opinion of its wisdom or policy." 12 C.J. 1302. There can be no question that the statute contemplates payment at the rate specified in the written contract and the Circut Court admitted this.

Point III.

PETITIONERS ARE ENTITLED TO A MARITIME LIEN FOR SERVICES RENDERED BY THEM FROM AND AFTER THE DATE THE VESSEL WAS LIBELLED.

The vessel was libelled on July 2, 1947. The period for which claim is made in the seamen's intervening libel is June 28, 1947 to August 5, 1947 (R. 10-13). The petitioners were requested to remain aboard the vessel by the captain acting as the agent of the owner of the vessel. The petitioners had not been ordered to leave either by the owner of the vessel nor by the captain of the ship. In point of fact, the captain of the vessel, acting as the owner's agent, entered into an oral agreement with each of the crew members by which agreement they were to continue in the service of the vessel for the purpose of taking care of it and maintaining it at the rate of pay that they were receiving before the written agreement was entered into

(R. 27-28). It was on August 5, that the petitioners ceased to render such services (R. 34-49).

The Courts look with much favor upon claims for wages by seamen for services rendered on the vessel and will whenever possible place wages in the favored category above other claims. This policy is in keeping with the Court's treatment of seamen as wards of the admiralty and is in pursuance of the Court's recognition that seamen perform a valuable service to the welfare of the nation, both in time of peace and in time of war, and is in recognition also of the serious and dangerous character of their calling See *The William Leishear, supra.*

In the cases of *The Herbert L. Rawdings*, 55 F. S. 156, E.D.S.C., 1944, and *N. Y. Drydock Company v. S. S. Poznan*, 274 U. S. 117, the Courts treated seamen's claims for wages earned from and after the time that the vessel was libelled and up to the date of their discharge by the Marshal in whose custody the vessel was, as a lien preferred in character. In the present case, the Marshal was informed of the fact and knew that the seamen were aboard the vessel and that they were rendering maintenance service. He did not discharge them. There was no effort made by the shipowner or by the other intervening libellants to have the seamen discharged. In fact, there was acquiesence on the part of all parties to the activity of the seamen in remaining aboard the said vessel and in maintaining it. There is ample testimony that petitioners did perform maintenance or caretaker service in the said period (R.27-28). For all of these reasons, it is submitted that the Court below erred by denying this claim.

Point IV.

THE CIRCUIT COURT MADE MISCELLANEOUS ERRORS IN ITS RULINGS AND FINDINGS.

(a) It Should Not Have Ruled Out Oral Testimony of the Petitioners Bearing on the Written Contract.

When the depositions of the petitioners were taken proctor for the petitioners asked all the petitioners what was their understanding as to when the contract was to become effective and other questions were asked pertaining thereto. Proctor for one of the intervening lien libellants objected to this question on the ground that the contract was clear on its face and to allow such evidence would amount to violation of the parol evidence rule. The District Judge sustained these objections (R. 88) and the Fourth Circuit Court agreed with this ruling. The sustaining of these objections was prejudicial to the appellants. There is no rule of law more flexible than the parol evidence rule; courts have sought to adapt their rulings "to the obvious demands of justice" in each particular case, 32 C.J.S. 929. Under the law, parol testimony is admissible in evidence to show the time when the performance of a written contract for doing certain work should begin and the time of the commencement of services under a written contract of employment and the length of time during which a written contract was to remain in force; 32 C. J. S. Sec. 1013, p. 1035. See also; *Case v. Phoenix Bridge Co.*, 59 N. Y. S. 435, 11 N. Y. S. 724, reversed on other grounds 31 N. E. 254, 134 N. Y. 78; *Meade v. Rutledge*, 11 Tex. 44; *Mills v. Roto Co.*, 133 A. 913, 104 Conn. 645; *Kerr v. Stern*, 175 N. Y. S. 475, 107 Misc. 4.

The facts in the case at bar involved the unexpected abandonment of the voyage. The contract was silent about such

an event. The law is well settled that the statute (46 U. S. C. A. Sec. 594) comes to the aid of the crew in such a case. However, parol evidence would have assisted the Court in ascertaining the understanding of the parties in such a contingency. The lower Courts erred in excluding this evidence which was clear and uncontradicted and which was that the petitioners were to receive their wages as specified in the contract whether the vessel sailed or not (R. 50, 66, 70, 75, 76, 78, 79, 80-83).

(b) Petitioner Vlavianos Is Entitled To A Maritime Lien For His Services Rendered Under The Written Contract In His Capacity As Radio Operator.

Captain Vlavianos, as shown by the undisputed evidence, was hired in a dual capacity, that of radio operator and master (R.). In the face of this uncontradicted evidence it was manifestly erroneous for the Court below to deny him the benefits of a maritime lien for his services, as a radio operator. These mixed functions take him out of the exception, which exception normally bars the captain from claiming a lien for wages due him. A radio operator is entitled to a lien against the vessel for wages due him because he is considered to be a member of the crew. It would be working a great hardship as well as an inequity upon Mr. Vlavianos if he were to be denied a lien when actually he was a radio operator on the vessel. There are numerous authorities holding that where a master performs other functions than those of a master on a boat he is entitled to a lien for wages due him. See *Swift v. Knowles*, 5 C. C. A., 1939, 100 F. 2d 977; *Wandtke v. Anderson*, 9 C. C. A., 1935, 74 F. 2d 381; *The Herdis*, D. C. Md., 22 F. 2d 304. In *Owen v. U. S., et al.*, S. D. N. Y., 1945 AMC 595, in a case where the master was also pilot and per-

formed such duties as pilotage services and where there was not an express contract, the court said, p. 596:

> "* * * Manifestly, as already stated there was no express contract in regard to pilotage. * * * But the evidence fully sustains an implied contract to pay the master for piloting the tug when the presence of a pilot was essential and none was available on the tug."

The fact that the ship remained in port during the period of this contract does not negative Vlavianos' right to recover under this contract as a radio operator.

In *Slavin v. Port Service Co.*, C. C. A. 3, 138 F. 2d 386, Judge Maris said:

> "* * * If Fowler was employed as an engineer he is entitled to a seamen's lien upon the vessel or proceeds. This is available to him if he was ready and willing to perform the duties for which he was engaged even though the services were not actually rendered because of idleness of the vessel. A maritime lien for wages has priority over liens of other types of creditors * * *."

It may be said that his services from and after June 28, 1947 and up to August 5, of that year were in the nature of a caretaker of the vessel. He and the crew maintained the vessel in good order and performed various duties in connection therewith. It has been held that in such a case the master is considered to be a caretaker for the purpose of claiming wages and thereby surmounts the bar ordinarily placed before a master who would claim a lien against the ship on account of wages due him. See *The Herdis*, D. C. Md. 1927, 22 F. (2d) 304.

Appellant Vlavianos therefore contends he is entitled to the fair value of his services performed as radio operator and to a maritime lien for them. The evidence showed that no radio operator was available aboard the vessel, that Vlavianos was qualified, present and available and the

courts below erred in refusing to allow him to assert his lien and recover. The amount to be awarded for his services as radio operator would be a fair amount of his total wage within the discretion and judgment of the Court. This could be easily determined because the overall wage is known and definite for the one month period.

(c) Petitioner Georgiou Is Entitled To A Maritime Lien For Monies Which He Advanced To A Passenger To Reimburse The Passenger For His Prepaid Fare And To Secure The Release Of The Master From The Custody Of The Law.

The federal statute (46 U. S. C. A. Sec. 971) gives a lien to any person who furnishes repairs, supplies or "other necessaries" to a vessel.

The Court below dealt very summarily with the claim of the second assistant engineer to recover money advanced by him to secure the release of the master from jail, holding that this did not involve "other necessaries" to the vessel.

The evidence is undisputed that Mr. Georgiou was called to the Central Police Station where the Master was being held until he repaid passage money, accepted by him on behalf of the owner, from a passenger who, tired of waiting for the S. S. CYPRESS to sail, demanded a refund. Mr. Georgiou paid this money at the request of Vlavianos and paid for incidental taxi expenses to secure the release of the Captain from the hands of the Police authorities (R. 12, 13, 72).

There can be no denial that the master was necessary to the vessel. Here there was no certainty that the ship would not sail immediately and Mr. Georgiou was simply assuring the owner, and the crew of complete readiness to sail if the order came through, and also that some person

in charge would be available to carry on the varied and responsible duties of a master of a ship. This we believe is an item of necessaries supplied to the vessel for her benefit and entitled to the protection afforded it by the statute and decisions of the courts. See the *William Leishear*, supra.

CONCLUSION

For the reasons heretofore stated, the petitioners should be granted a writ of certiorari in order that their claims as presented herein may be heard and a proper adjudication made. It is urged that the claims of the petitioners are entirely consistent with the federal statute involved (46 U. S. C. A. Sec. 594) and with the settled decisions, and should be allowed therefore.

Respectfully submitted,

I. DUKE AVNET,
Attorney for Petitioners.